BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KELLY M. SKIPPER	)	
Claimant	)	
	)	
VS.	)	
	)	
BLACKBURN CONSTRUCTION, INC.	)	
Respondent	)	Docket No. 1,047,926
	)	
AND	)	
	)	
INS. CO. OF STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the December 3, 2009, preliminary hearing Order entered by Administrative Law Judge John D. Clark. Brian D. Pistotnik, of Wichita, Kansas, appeared for claimant. John B. Rathmel, of Merriam, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant was injured out of and in the course of her employment with respondent and ordered her medical paid and payment of temporary total disability benefits.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the December 3, 2009, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.[1]

[1] Counsel for respondent, in his brief to the Board, asserts that "examination of the actual physical exhibits by the Appeals Board is highly important to the fact finder herein, and counsel stands ready to deliver the actual physical exhibits to the Appeals Board at the Board's convenience." (Resp. Brief, filed Jan. 7, 2010, at 1) However, an examination of the hearing transcript shows that the actual hard hat and bolt were neither offered nor admitted into evidence. Instead, only a photograph of these objects was admitted. (P.H. Trans. at 5 and 6.)

ISSUES

Respondent argues that claimant has failed to meet her burden of proof in establishing that she suffered personal injury by an accident on October 4, 2009, that arose out of and in the course of her employment and, therefore, she is not entitled to workers compensation benefits.

Claimant argues that this issue deals with her credibility and that of respondent's witnesses. She asks that the Board defer to the ALJ's judgment of the credibility of the witnesses and affirm the ALJ's preliminary hearing Order finding that she suffered personal injury by accident that arose out of and in the course of her employment.

The issue for the Board's review is: Did claimant suffer personal injury by accident that arose out of and in the course of her employment?

FINDINGS OF FACT

Claimant worked for respondent, a subcontractor at one of the oil refineries in El Dorado. On Sunday, October 4, 2009, claimant was working at the Frontier Refinery pulling pipe and replacing valves. Claimant testified she was wearing a hard hat and was standing next to a pillar. A coworker, Ron Ray, was on a scaffold 8 to 10 feet above her.[2] At one point, welding slag began to fall on her, and she yelled up to Mr. Ray that people were working below and to be careful. A few minutes later, Mr. Ray pulled on a fire blanket, and a large bolt fell off the scaffold. Claimant asserts the bolt hit her hard hat, leaving a 2.5 inch scrape on the hard hat and "discombobulating" her glasses. She testified that she was knocked against the pillar. She was stunned but did not black out.

After being hit, claimant noticed the bolt on the floor between her and the pillar. She said she screamed up at Mr. Ray that he had just hit her with a bolt and he needed to be careful. She testified that Mr. Ray came down off the scaffold and asked her if she was okay. Claimant testified that a coworker, Jeremiah Winter, was standing four feet in front of her at the time the bolt fell. But he was turned away and did not see her get hit. Claimant stated, however, that Mr. Winter heard the bolt hit the ground. Claimant stated that the noise made when the bolt hit her hard hat was a loud hollow thud. She could not testify for sure whether anyone heard the noise of the bolt hitting her hard hat.

Claimant testified that the bolt that fell probably weighed between 4.5 and 7 pounds. The edges on the bolt were sharp. Respondent brought the hard hat claimant was wearing at the time of the alleged accident to the preliminary hearing. Claimant admitted during her testimony that there was no longer a scrape mark on the hard hat. Claimant testified that

[2] There was later testimony that the scaffold was 17 feet above the floor.

Mr. Tole took the hard hat away from her the day after the alleged accident. He told her she could no longer use that hat because of the bolt falling on it.

Claimant testified she was at first stunned and shook it off. However, she later bent over to pick up a tool and her head started throbbing and she began to feel nauseous. She walked to the refinery fire station and had difficulty because she was dizzy. She was examined by one of the firemen She said the site safety representative, Wes Tole, recommended that she go home and lie down. But she and Mr. Tole then sat in a truck for about 30 minutes and filled out a safety report. After that was done, she was told to wait before leaving because Mr. Tole needed to speak with her boss, Mark Burtin. Claimant however, stated that she had a severe headache and called Sam Mills, the project coordinator. He told her to go home and rest, and that is what she did.

Claimant testified that when she returned to work the next day, she had been switched from the turnaround crew to the maintenance crew. She did not do much work on Monday. On Tuesday, she stayed around the shop and picked up trash. She testified that she had a headache and was throwing up. At one point, she went into the tool shed and laid down because the light was hurting her eyes. On Tuesday afternoon, claimant left work and drove from El Dorado to Salina, Kansas, to pick up her son, and then drove her son to Wichita, Kansas, for an appointment. She had a friend take her son back to Salina, and she went back home. She then got a telephone call from Mr. Mills, who told her she was being laid off until further notice.

Jeremiah Winter testified that he was working in the same area as claimant on Sunday, October 4, 2009. He heard the sound of the bolt hitting the concrete floor about three feet away from him, but he did not hear anything before the bolt hit, other than the sound of the welding slag a few minutes earlier. After the bolt hit the ground, he hollered up to whoever was above to pay attention to what he was doing. He did not hear claimant yell at anyone. He testified that as soon as the bolt hit the ground, claimant said “Ouch” in a joking manner and then said, “I’m glad I wasn’t standing there.”[3]

Mr. Winter said he has never seen a bolt that size fall before but has been present when smaller bolts have hit hard hats. He said the sound is a distinct hollow-type sound. When the bolt fell, claimant was five or six feet away from him, and the bolt landed about half-way between them. At the time, claimant was around the corner of the pillar under the drums. Mr. Winter said that there was no possible way the bolt could have fallen and hit her. Claimant did not tell him that she had been hit by the falling bolt. But about an hour later, he was told she was claiming to have been hit by the bolt. He and Mr. Tole went to the area where the bolt fell, and they could see an indentation where the bolt had edged into the ground and taken out a chunk of concrete. The chunk was approximately two and a half inches long and a quarter inch deep. He also saw the hard hat claimant was wearing

[3] P.H. Trans. at 48.

at the time. He saw a small scuff mark on the side of the hat but no scrape on the front of the hat as was claimed by claimant.

Wes Tole, respondent's safety site manager, investigated the incident that took place on October 4, 2009. He testified that the bolt fell from a scaffold that was 17 feet above the concrete floor, and the bolt would have fallen a distance of distance of about 11 feet if it had hit claimant's hard hat.

When Mr. Tole first saw claimant, she told him she had a migraine headache and had taken an aspirin. Mr. Tole visited with the EMT who examined claimant, and the EMT told him he had not found anything wrong with claimant. Mr. Tole spoke with three of claimant's coworkers who were in the area at the time the bolt fell, and none had seen the bolt fall or seen or heard the bolt hit claimant. Mr. Winter told him that after the bolt fell, claimant made the comment that she was glad she had not been standing there. Mr. Winter also told him he assumed claimant had not been hit because he did not hear the noise that would have been made if the bolt had hit her hard hat, her hard hat was not knocked off, and she did not stumble or fall.

Mr. Tole then went back to the break tent where he had earlier dropped claimant off and found that she had left for the day. The next morning, he confiscated her hard hat. He said that whenever there is blunt force to a hat, whether it is apparent, subjective or even hearsay, it is best to take the hat away because if it has been hit, it will not hold up to the required standards. He testified that the hat that was present at the preliminary hearing was the hat he had taken from claimant and that the only change in the hat was the inside suspension had been removed. There was no gash in the hat.

Sam Mills is the project coordinator for respondent at the Frontier-El Dorado Refinery Company. Mr. Mills testified that he had gotten a call from claimant's immediate supervisor, Mr. Burtin, saying that claimant wanted to go home. Mr. Mills told him because the EMT had checked claimant out and said she was okay, if claimant left it would be unexcused. Claimant also called him and Mr. Mills asked her if she had been hit by the object, and she said she did not think so but she had a headache and wanted to go home. Claimant denied that Mr. Mills asked her whether she had been hit. She testified that she asked Mr. Mills whether she would be able to come back to work the next day if she went home because she had been hit by a bolt and had a headache.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[4] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[5]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[6]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[8]

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[4] K.S.A. 2009 Supp. 44-501(a).

[5] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[6] *Id.* at 278.

[7] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. __, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[8] K.S.A. 2009 Supp. 44-555c(k).

ANALYSIS

Claimant contends that a bolt weighing approximately 4.5 to 7 pounds fell between 8 and 11 feet, striking her on the hard hat she was wearing, leaving a 2.5 inch long scrape on the hat and knocking her back against a pillar. She alleges she then yelled up at Mr. Ray and told her coworker, Mr. Winter, that she had been hit by the bolt.

At the preliminary hearing, claimant identified her hard hat and acknowledged that it did not have the scrape on it that she described. Mr. Winter testified that claimant was standing three or four feet from the bolt when claimant said, "I'm glad I wasn't standing there."[9] Mr. Winter understood this to mean that claimant had not been struck by the bolt. In addition, Mr. Winter said it would have been impossible for claimant to be struck from where she was standing because she was under a protected area. Also, Mr. Winter heard the bolt hit the concrete but did not hear it hit claimant's hard hat. Furthermore, Mr. Winter said he yelled at Mr. Ray but claimant did not.

Mr. Tole investigated the incident on the day of the alleged accident and obtained a similar statement from Mr. Winter on that day as to what Mr. Winter testified to at the preliminary hearing. Claimant was examined at the job site by an EMT or fireman, who found nothing wrong. Claimant had no marks, cuts or abrasions. She reported having a headache and nausea.

Finally, Mr. Mills said claimant told him on the day of the incident, by telephone, that she did not think the bolt had hit her.

This Board Member concludes that the greater weight of the credible evidence is that claimant was not struck by the falling bolt.

CONCLUSION

Claimant has failed to prove that she suffered personal injury by accident on the date alleged that arose out of and in the course of her employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated December 3, 2009, is reversed.

IT IS SO ORDERED.

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[9] P.H. Trans. at 48.

Dated this _____ day of March, 2010.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant
John B. Rathmel, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge